Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
	)	
Petition of BellSouth Telecommunications, Inc.	)	WC Docket No. 04-405
For Forbearance Under 47 U.S.C. § 160(c) From	)	
Application of *Computer Inquiry* and Title II	)	
Common-Carriage Requirements	)	
	)	

OPPOSITION OF THE INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA

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SUMMARY

The "relief" that BellSouth seeks goes well beyond the proposals that the Commission made – but has thus far declined to adopt – in the *ILEC Broadband Non-Dominance Notice* and the *Broadband Wireline ISP Notice.* If the Commission grants BellSouth's petition, the ILECs will have the legal right to *refuse* to provide broadband telecommunications services – including special access services – to non-affiliated ISPs. If the ILECs choose to provide these services to non-affiliated ISPs, the ILECs would be able to do so at prices, terms, and conditions that are significantly less favorable than those on which they provide the identical services to themselves and their affiliates. To the extent non-affiliated ISPs remain in the market, the ILECs would be able to distort competition by cross-subsidizing their broadband information service offerings.

BECAUSE THE ILECs RETAIN SIGNIFICNT MARKET POWER IN THE WHOLESALE BROADBAND TELECOMMUNICATIONS SERVICES MARKET, TITLE II REGULATION REMAINS NECESSARY

Contrary to BellSouth's assertion, the market for "broadband services" is not fully competitive. In most cases, ISPs that do not own their own facilities, but which seek to provide broadband information services, must obtain wholesale broadband telecommunications service from an ILEC. Title II regulation, therefore, remains necessary in this market.

Wholesale Mass Market. There is little "intermodal" competition in the wholesale mass market broadband telecommunications service market. No cable system offers a generally available wholesale broadband transmission service that ISPs can use to serve their mass market retail customers. Whatever their future potential may be wireless and satellite providers currently are niche players in the broadband market, with a market share of less than three percent.

Special access. BellSouth's forbearance request apparently applies to broadband special access services, which ISPs often use to provide service to their enterprise customers. Given the

absence of effective competition, the Commission should eliminate the ILECs' "pricing flexibility" in the special access market. Even if the Commission declines to do so, however, it plainly should not eliminate the ILECs' obligation, under Title II, to make special access services available on just, reasonable, and non-discriminatory prices, terms, and conditions.

THE COMMISSION CANNOT – AND SHOULD NOT – ELIMINATE THE *COMPUTER II* UNBUNDLING RULES

BellSouth's arguments for eliminating the *Computer II* unbundling rules are meritless.

No legal authority. As an initial matter, the Commission lacks legal authority to eliminate the ILECs' service unbundling obligation. The Commission has repeatedly held that Section 202(a) of the Communications Act – which prohibits common carriers from engaging in "unjust or unreasonable discrimination" in the provision of a telecommunications service – imposes an independent obligation on facilities-based carriers to unbundle the transmission capacity underlying its information services and make those services available to non-affiliated ISPs. The Commission cannot eliminate a carrier's statutory non-discrimination obligation through the use of its forbearance power.

Regulatory symmetry. Contrary to BellSouth's assertion, nothing in the Communications Act requires "symmetry" in the regulation applicable to ILECs and the cable systems. To the contrary, Congress has imposed different regulatory obligations on ILECs and cable system operators. Congress' decision to impose special obligations on the ILECs reflects their unique role: The ILECs' local networks were constructed in order to transport information provided by others. They remain the only transmission platform that can provide access to virtually any business or residence in the country. Thus, even if the Commission does not extend the *Computer II* unbundling obligation to cable-provided information services, it should retain those obligations for ILEC-provided information services.

The Triennial Review Order. The Commission's decision in the *Triennial Review Order* – which eliminated the ILECs' obligation to unbundle certain network elements in order to create incentives for ILECs and CLECs to deploy broadband network facilities – has no relevance to this proceeding. Because ILECs require wholesale broadband telecommunications services to provide their own information service offerings, and because the rates that the ILECs charge for these services are well above TELRIC, requiring the ILECs to provide these services to non-affiliated ISPs is not likely to significantly reduce the ILECs' deployment incentives. At the same time, because ISPs have never been expected to deploy their own facilities, the Commission has no need to create incentives for them to do so.

Incentive to discriminate. BellSouth's claim that regulation is unnecessary because the ILECs have no incentive to discriminate against ISPs is plainly wrong. Because the ILECs' wholesale broadband telecommunications services are a significant input for broadband Internet access services, and because the ILECs compete directly against non-affiliated ISPs in the "downstream" market for broadband Internet access services, the ILECs have the ability and incentive to subject rival ISPs to a "price squeeze" in order to drive them from the market.

THE ILECs RETAIN THE INCENTIVE TO CROSS-SUBSIDIZE THEIR BROADBAND INFORMATION SERVICE OFFERINGS

The Commission should not forbear from applying the Joint Cost Rules to ILEC network facilities used to provide broadband information services. Contrary to BellSouth's assertion, even under a price cap regime, the ILECs retain an incentive to improperly allocate the cost of facilties used to provide basic telecommunications and information services in order to cross-subsidize their more competitive information service offerings. If the Commission forbears from applying the Joint Cost Rules, the ILECs could force their basic telecommunications customers

to absorb 100 percent of the cost of any facility that is used to provide both basic telecommunications and broadband information services. This plainly would harm consumers.

TABLE OF CONTENTS

Before the
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In the Matter of	)	
	)	
	)	
Petition of BellSouth Telecommunications, Inc.	)	WC Docket No. 04-405
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	)	

OPPOSITION OF THE INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA

The Information Technology Association of America ("ITAA") hereby opposes the Petition filed by BellSouth Telecommunications, Inc. ("BellSouth") for forbearance from the application of Title II common carrier requirements, the *Computer II* unbundling requirements, and the Part 64 cost allocation rules to broadband telecommunications services provided by incumbent local exchange carriers ("ILECs").[1]

INTRODUCTION

BellSouth contends that, pursuant to Section 10 of the Communications Act, 47 U.S.C. § 160, the Commission must eliminate three categories of regulation. First, BellSouth insists that the Commission must eliminate application of all "Title II common-carrier requirements" to ILEC broadband telecommunications service.[2] Second, BellSouth demands that the Commission lift the requirement, contained in the Commission's *Computer II* rules, that the ILECs unbundle

[1] Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. § 160(c) From Application of *Computer Inquiry* and Title II Common-Carriage Requirements, WC Docket No. 04-405 (filed Oct. 27, 2004) ("BS Petition").

[2] *Id. at* 29.

the broadband transmission functionality that they use to provide information services, offer that functionality as a tariffed telecommunications service, and obtain that service on the same tariffed prices, terms, and conditions as non-affiliated information service providers ("ISPs").[3] Finally, BellSouth contends that the Commission must cease to require the ILECs to comply with the Joint Cost Rules – which require the ILECs to allocate an appropriate portion of their network facilities costs to their non-regulated operations – in any case in which an ILEC uses a facility to provide both basic telecommunications and broadband information services.[4]

The Commission should make no mistake about what BellSouth is requesting. If the Commission grants BellSouth's petition, the ILECs will have the legal right to *refuse* to provide broadband telecommunications services – including special access services – to non-affiliated ISPs. If the ILECs choose to provide these services to non-affiliated ISPs, the ILECs will be able to do so at prices, terms, and conditions that are significantly less favorable than those on which they provide the identical services to themselves and their affiliates. Because ISPs generally are not able to purchase wholesale broadband transmission service from cable, wireless, and satellite providers, a decision by an ILEC not to provide broadband telecommunications to an ISP – or to provide it on discriminatory prices, terms, and conditions – would make it literally *impossible* for many ISPs to provide competitive broadband information services. To the extent non-affiliated ISPs remain in the market, the ILECs – freed from the Commission's Joint Cost Rules – would be able to distort competition by cross-subsidizing their broadband information service offerings.

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[3] *Id. at* 17-29.

[4] *See id.* at 1.

The "relief" that BellSouth seeks goes well beyond the proposals that the Commission made – but has thus far declined to adopt – in the *ILEC Broadband Non-Dominance Notice*.[5] In that docket, the Commission proposed to continue to require the ILECs to provide broadband telecommunications services on a common carrier basis, while eliminating dominant carrier regulations (such as the duty to file tariffs) applicable to many of these services.[6] Here, by contrast, BellSouth seeks complete elimination of Title II common carrier regulation. This includes the obligation, contained in Section 202(b) of the Act, 47 U.S.C. § 202(b), that the ILECs provide telecommunications service on just, reasonable, and non-discriminatory prices, terms, and conditions. Moreover, BellSouth's petition apparently seeks deregulation of broadband special access services, which the Commission specifically excluded from consideration in the *ILEC Broadband Non-Dominance* proceeding.[7]

Similarly, BellSouth's forbearance petition seeks more extensive deregulation than the Commission proposed – but has thus far declined to grant – in the *Broadband Wireline ISP Notice*.[8] In that docket, the Commission proposed to eliminate application of the *Computer II* unbundling requirement to mass market telecommunications services, such as digital subscriber

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[5] *Review of the Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services,* Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001) ("*ILEC Broadband Non-Dominance Notice*").

[6] *See ILEC Broadband Non-Dominance Notice*, 16 FCC Rcd at 22763-69.

[7] *See id.* at 22758 (noting that the proceeding did not address regulatory treatment of "traditional special access services . . . [which] are governed by the Commission's pricing flexibility regime").

[8] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities,* Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) ("*Broadband Wireline ISP Notice*").

line ("DSL") services, that the ILECs use to provide broadband Internet access service.[9] Here, by contrast, BellSouth demands that the Commission forbear from applying the *Computer II* unbundling requirement to any telecommunications service that an ILEC uses to provide any information service. Moreover, BellSouth's petition seeks elimination of the Joint Cost Rules, which the Commission has never proposed.[10]

For the reasons set forth below, the Commission should deny in full BellSouth's forbearance petition.

STATEMENT OF INTEREST

ITAA is the principal trade association of the computer software and services industry. ITAA has 500 member companies located throughout the United States – ranging from major multinational corporations to small, locally based enterprises. ITAA's members include a significant number of ISPs that have always been (and remain) critically dependent on telecommunications services provided by the ILECs. Therefore, during the last 25 years, ITAA (and its predecessor, ADAPSO) has participated actively in Commission proceedings governing the obligations of the Bell Operating Companies ("BOCs") and other ILECs to offer the basic telecommunications services necessary to provide information services on a just, reasonable, and non-discriminatory basis. Such participation includes all three of the *Computer Inquiries,* and the *Open Network Architecture*, *Competitive Carrier*, *Local Competition*, *Access Reform*, *Broadband Non-Dominance*, and *Broadband Wireline ISP* proceedings.

[9] *See id.* at 3040-43 (seeking comments regarding application of the Computer Rules "to self-provisioned wireline broadband Internet access service.").

[10] In the *Broadband Wireline ISP* docket, the Commission sought comment regarding the elimination of the "access safeguards" that the Commission adopted in the *Computer Inquiries* – specifically the unbundling, comparably efficient interconnection, and open network architecture requirements *See Broadband Wireline ISP Notice*, 17 FCC Rcd at 3040-43. The Commission did not propose to eliminate safeguards, such as the Joint Cost Rules, designed to prevent cross-subsidization.

I. BECAUSE THE ILECs RETAIN SIGNIFICNT MARKET POWER IN THE WHOLESALE BROADBAND TELECOMMUNICATIONS SERVICES MARKETS, TITLE II COMMON CARRIER REGULATION REMAINS NECESSARY

BellSouth asserts that Title II common carrier regulation of ILEC-provided broadband services is no longer necessary because the ILECs are subject to "vigorous intermodal competition."[11] BellSouth's assertion is wrong. The ILECs plainly retain a dominant position in the provision of *wholesale* broadband telecommunication services, which ISPs require in order to provide service to both mass market and enterprise customers. The Commission, therefore, should not eliminate the ILECs' obligation to provide these services to ISPs on just, reasonable, and non-discriminatory prices, terms, and conditions.

A. The ILECs are Not Subject to Inter-Modal Competition in the Market for *Wholesale* Mass Market Broadband Telecommunications Services

BellSouth contends that the market for "broadband services" is a competitive one, in which the ILECs are subject to "intermodal" competition from cable, wireless, and satellite providers.[12] BellSouth, however, focuses only on the provision of *retail* mass market broadband information services – such as the provision of broadband Internet access to residential consumers. There is no doubt that, at the present time, far more residential customers obtain broadband Internet access service from cable-based ISPs than from wireline-based ISPs. BellSouth, however, has completely ignored the *wholesale* market. ISPs that do not own their

[11] BS Petition at 18; *see also id.* at 31 ("[B]ecause ILECs lack market power in broadband transmission, they cannot charge unjust or unreasonably discriminatory rates.").

[12] *See id.* at 18-19. BellSouth does not even attempt to argue that service provided by competitive local exchange carriers ("CLECs") offers a viable competitive alternative to the ILECs' wholesale broadband transmission service. To the contrary, BellSouth insists that the broadband market would be competitive "'even if all CLECs were driven from the broadband market.'" BS Petition at 19 (quoting *USTA v. FCC,* 359 F.3d 554, 582 (D.C. Cir. 2004)). Given the Commission's decision to eliminate the ILECs' obligation to allow CLECs to "line share," there is a very real possibility that the ILECs ultimately will do just that.

own facilities, but which seek to provide broadband information services to mass market customers, must obtain broadband transmission service. In most cases, ISPs have no viable alternative but to obtain this service from an ILEC.

Cable systems do not provide intermodal competition in the wholesale mass market broadband telecommunications service market.[13] To the contrary, no cable system offers a generally available wholesale broadband transmission service that ISPs can use to serve their mass market retail customers.[14] Indeed, the Commission has repeatedly rejected proposals to require cable operators to do so.[15] Moreover, efforts by some localities to impose "open access" requirements have been found to be unlawful.[16] As a result, in most cases, an ISP that is unable

[13] ITAA discussed the lack of intermodal and intramodal competition in the market for wholesale mass market broadband telecommunications services in greater detail in the comments that it filed in the *ILEC Broadband Non-Dominance* proceeding. *See* Comments of the Information Technology Association of America, CC Docket No. 01-337 (filed Mar. 1, 2002). ITAA respectfully requests that those comments be incorporated in the record of this proceeding.

[14] In any case, because cable systems generally serve only residential customers, ISPs cannot use cable to access business customers. Rather, in most cases, the only feasible means to provide broadband information services to these customers is over the public switched telephone network.

[15] *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002). At the present time, only one cable system (Time Warner) is under any legal obligation to cooperate with non-affiliated ISPs. Even Time Warner, however, is not subject to a general requirement to provide a wholesale broadband transmission service available to any ISP. Rather, pursuant to a consent decree with the Federal Trade Commission, and consistent with the Commission's order approving the necessary transfers of control in the AOL-Time Warner merger, Time Warner was required to enter into agreements with three nonaffiliated ISPs in which Time Warner and the ISP jointly provide a high-speed Internet access service to retail customers. *See Application for Consent of Transfer of Control of Licenses and Section 214 Authorization by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee,* Memorandum Opinion and Order, 16 FCC Rcd 6457, 6568-69 (2000).

[16] *See, e.g., AT&T v. City of Portland*, 216.F.3d 871 (9th Cir. 2000) (Communications Act precludes franchise authority from conditioning a cable license transfer on provision of "open access").

to obtain wholesale broadband telecommunications services from an ILEC at a reasonable price cannot obtain a substitute service from a cable system operator.

ISPs also generally cannot obtain wholesale broadband telecommunications service from other platform providers. Whatever their future potential may be, at present, wireless and satellite providers remain niche players in the broadband market. According to BellSouth's own petition, 97.2 percent of the 29 million broadband customers obtain service from either a LEC or a cable company.[17] Of the remainder, BellSouth estimates that approximately 2.1 percent of broadband customers (approximately 600,000 customers) obtain broadband service from wireless providers,[18] while about 0.8 percent of broadband customers (approximately 220,000 customers) obtain service from satellite-based providers.[19] Finally, while BellSouth predicts that power line technology has "enormous broadband potential,"[20] BellSouth provides no evidence that any customer currently is obtaining broadband service from a power line provider.

Even if satellite, wireless, and power line broadband services grow significantly in the coming years, these providers – like cable operators – are not under a legal obligation to "open" their transmission networks to non-affiliated ISPs. As a result, like cable operators, they may decline to provide wholesale transmission service to non-affiliated ISPs that seek to serve mass market customers – and, instead, offer retail mass market customers a bundled service consisting

[17] *See* BS Petition at 9 (noting that, in the first half of 2004, 16.9 million households subscribed to cable modem and 11.3 million households subscribed to DSL).

[18] *Id.* at 11 (citing 2002 estimate by the License-Exempt Alliance – a figure that, BellSouth concedes, is twice as large as the Commission's June 2003 estimate).

[19] *See id.* at 11-12 (citing estimates that Hughes Satellite provides service to approximately 180,000 customers, while StarBand has approximately 38,000 customers).

[20] *Id.* at 12.

of transmission and information services. Because ILECs are not subject to competition in the market for wholesale mass market telecommunications services, the Commission should not reduce or eliminate Title II common carrier regulation of these offerings.

B. ISPs That Serve Enterprise Customers Remain Dependent on the ILECs for Special Access Services

BellSouth's petition is not limited to mass market broadband services. Rather, BellSouth asserts that the Commission must eliminate regulation of *all* broadband services. BellSouth defines "broadband services" as services "that are capable of providing 200 Kbps in both directions."[21] Thus, BellSouth's forbearance request apparently applies to most special access services, which ISPs often use to provide service to their enterprise customers.

The Commission has always recognized that the ILECs must offer special access services on a common carrier basis. In 1999, however, the Commission granted the ILECs significant "pricing flexibility" based on its expectation that significant competition would develop in this market.[22] In the years since the Commission did so, the ILECs have significantly increased their special access prices, and now earn a return well in excess of competitive levels. As a result, in 2002, a petition was filed asking the Commission to initiate a rulemaking to eliminate the previously granted "pricing flexibility."[23] The Commission has indicated that it will soon act on this long-pending petition. ITAA believes that, given the absence of effective competition, the Commission should eliminate the ILECs' "pricing flexibility" in the special

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[21] *Id.* at 1 n.2.

[22] *See Access Charge Reform ,* Fifth Report and Order, 14 FCC Rcd 14221 (1999).

[23] *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Petition for Rulemaking, RM-10593 (filed Oct. 15, 2002).

access market. Even if the Commission declines to do so, however, it plainly should not eliminate the ILECs' obligation, under Title II, to make special access services available to ISPs and other customers on just, reasonable, and non-discriminatory prices, terms, and conditions.

II. THE COMMISSION CANNOT – AND SHOULD NOT – ELIMINATE THE ILECs' OBLIGATION TO UNBUNDLE, AND OFFER ON A NON-DISCRIMINATORY BASIS, THE BROADBAND TELECOMMUICATIONS SERVICES THAT THEY USE TO PROVIDE INFORMATION SERVICES

BellSouth advances several arguments in support of its demand that the Commission eliminate the requirement, contained in the *Computer II* rules, that the ILECs unbundle the broadband transmission functionality that they use to provide information services, offer that functionality as a tariffed telecommunications service, and obtain that service on the same tariffed prices, terms, and conditions as non-affiliated ISPs. In particular, BellSouth contends that: (1) the Commission has not imposed a comparable requirement on cable systems; (2) the Commission concluded, in the *Triennial Review Order,* that eliminating broadband unbundling would promote ILEC facilties deployment; and (3) the ILECs have no incentive to discriminate against non-affiliated ISPs. None of these assertions provides a basis for the Commission to eliminate the *Computer II* unbundling rules.

A. The Commission Lacks the Legal Authority to Eliminate the ILECs' Obligation to Provide Telecommunications Service to Non-affiliated ISPs on a Non-Discriminatory Basis

As an initial matter, the Commission cannot eliminate the requirement that the ILECs unbundle the telecommunications services that they use to provide information services, and make those services available to non-affiliated ISPs, because doing so would violate the Communications Act. Section 202(a) of the Act prohibits carriers – whether dominant or non-dominant – from engaging in "unjust or unreasonable discrimination" in the provision of a

telecommunications service.[24] The Commission has held repeatedly that this provision imposes an independent obligation – separate from the one contained in the *Computer II* rules – that requires any facilities-based carrier that provides information services to unbundle the transmission capacity underlying its information services and make that capacity available to competing ISPs on a non-discriminatory basis.

Consistent with this principle, in the *Interexchange Marketplace Reconsideration Order,* adopted in 1995, the Commission observed that – in addition to the *Computer II* unbundling requirement – "section 202 of the Act prohibits [facilities-based carriers] from discriminating unreasonably in [the] provision of basic services" to non-affiliated ISPs.[25] Similarly, in the *Frame Relay Order,* which held that the *Computer II* rules required AT&T to unbundle its basic frame relay service, the Commission noted that "Section 202 of the Act *also* prohibits a carrier from discriminating unreasonably in its provision of basic services."[26] And, more recently, in the *CPE/Enhanced Service Bundling Order,* the Commission re-iterated that "all carriers have a firm obligation under section 202 of the Act to not discriminate in their provision of transmission service to competitive internet or other enhanced [information] service providers."[27] The Commission further observed that "discrimination . . . that favor[s] one competitive enhanced

[24] 47 U.S.C. § 202(a).

[25] *Competition in the Interstate Interexchange Marketplace,* Memorandum Opinion and Order On Reconsideration, 10 FCC Rcd 4562, 4580 & n.72 (1995).

[26] *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling That AT&T's InterSpan Frame Relay Service Is a Basic Service,* Memorandum Opinion and Order,10 FCC Rcd13717, 13719 (1995) (emphasis added).

[27] *Policy and Rules Concerning the Interstate, Interexchange Marketplace,* Report and Order, 16 FCC Rcd 7418, 7445 (2001).

service provider over another or the carrier, itself, [is also] an unreasonable practice under section 201(b) of the Act."[28]

The Commission cannot eliminate the statutory non-discrimination obligation through the use of its forbearance power. Section 10 of the Communications Act, which is the Commission's sole source of forbearance authority,[29] does not allow the Commission to forebear from imposing any statutory provision necessary to ensure that a carrier's charges or practices are not "unreasonably discriminatory."[30] Continued application of the prohibition against unreasonable discrimination, which is contained in Title II, is necessary to ensure that the ILECs do not discriminate unreasonably against non-affiliated ISPs. Indeed, BellSouth has expressly conceded that, if the Commission eliminates this requirement, it will provide service on a "private carrier" basis.[31] As a private carrier, BellSouth could refuse to provide service to an ISP – or could provide service on a discriminatory basis. The Commission cannot use its forbearance authority to allow BellSouth and the other ILECs to do so.[32]

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[28] *Id.* at 7445-46.

[29] *See ASCENT v. FCC,* 235 F.3d 662 n.7 (D.C. Cir. 2001) (noting the Commission's conclusion that Section 706 of the Telecommunications Act is not an independent basis of forbearance authority).

[30] 47 U.S.C. § 160(a)(1).

[31] BS Petition at 28-29.

[32] Contrary to BellSouth's assertion, *see* BS Petition at 29-30, the Commission cannot allow a common carrier to provide telecommunications service on a private carrier basis whenever the Commission determines the market is competitive. *See NARUC v. FCC,* 525 F.2d 630, 644 (D.C. Cir. 1976) (The Commission does not have "unfettered discretion . . . to confer or not confer common carrier status on a given entity, depending on the regulatory goal its seeks to achieve.); *Cf. ASCENT v. FCC,* 235 F.3d at 666 (Commission cannot "circumvent" the limitations on its forbearance authority based on a determination that the "advanced services" market is competitive). Indeed, the Commission has previously considered – and rejected – a proposal to do just that. In 1990, the Commission proposed to "permit IXCs to provide a limited amount of [telecommunications] service" – exclusively in the competitive large business customer market

B. The Commission's Decision Not to *Extend* the *Computer II* Unbundling Requirement to Cable System Operators Provides No Basis to Eliminate Application of Those Rules to Telecommunications Carriers

BellSouth insists that the Commission must treat ILECs and cable systems identically. Because the Commission declined to extend the *Computer II* unbundling requirement to cable system operators, BellSouth contends, the Commission must cease applying that rule to the ILECs.[33] This is plainly wrong.

In the *Cable Declaratory Ruling,* the Commission declined to apply the *Computer II* unbundling rule to cable systems on the grounds that cable-system-provided Internet access service is exclusively an information service, and that cable system operators should not be required to "extract" the underlying telecommunications service and offer it on a non-discriminatory basis.[34] The Ninth Circuit, however, subsequently vacated that decision in the *Brand X* case, finding that cable-based Internet access services consists of both an information and a telecommunications service.[35] The Supreme Court has now agreed to review this

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– "on a private carriage basis." *Competition in the Interstate Interexchange Marketplace,* Notice of Proposed Rulemaking, 5 FCC Rcd 2627, 2644-45 (1990). In the face of significant questions as to the Commission's legal authority, the agency subsequently declined to adopt this proposal. *See Competition in the Interstate Interexchange Marketplace,* First Report and Order, 6 FCC Rcd 5880, 5897 n.150. (1991).

[33] *See* BS Petition at 4, 20 & 27 ("Both law and sound policy require the Commission to. . . put wireline providers on the same footing" as cable system operators.).

[34] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4825 (2002) ("*Cable Declaratory Ruling*").

[35] *See Brand X Internet Service v. FCC,* 345 F.3d 1120 (9th Cir. 2003).

decision.[36] If the Supreme Court affirms the Ninth Circuit's decision, both ILEC and cable-provided information services will be subject to the same regulatory requirements, thereby eliminating BellSouth's objections that the regulatory regime applicable to ILEC-provided broadband services is more onerous than the regulatory regime applicable to cable-provided information services.[37]

Even if the Supreme Court reverses the Ninth Circuit, and upholds the Commission's *Cable Declaratory Ruling,* this does not provide a basis for the Commission to stop applying the *Computer II* unbundling rule to ILEC-provided information services. While the Telecommunications Act removed legal barriers to intermodal competition, it did not abolish the separate regulatory regimes applicable to ILECs and cable system operators. To the contrary, Congress imposed specific regulatory obligations on the ILECs, which are designed to protect consumers and promote competition.[38] These obligations are fully applicable to the ILECs' provision of broadband telecommunications services. Congress' decision to impose special obligations on the ILECs reflects their unique role: The ILECs' local networks were constructed in order to transport information provided by others. They remain the only transmission

[36]. *See* 543 U.S. __ (Dec. 3, 2004). At a minimum, the Commission should conclude that it is not in the public interest to grant BellSouth's forbearance request until after the Supreme Court decides the *Brand X* case, which should significantly clarify the Commission's obligations to regulate broadband services.

[37] Contrary to BellSouth's assertion, *see* BS Petition at 15, if cable system operators are providing a telecommunications service, that service will have to be offered pursuant to Title II. As explained above, the Commission cannot forbear from applying the requirement that carriers provide telecommunications services on a non-discriminatory basis. Therefore, cable system operators will be required to unbundle their telecommunications services and offer them on a non-discriminatory basis.

[38] *See, e.g.,* 47 U.S.C. § 251(c).

platform that can provide access to virtually any business or residence in the country. The public interest requires that the ILECs keep this platform "open" on a non-discriminatory basis.

By contrast, cable systems were designed to provide one-way transmission of multi-channel video programming. Therefore, cable systems historically have not been required to provide transmission service to others. Rather, Congress has imposed different regulatory obligations. For example, cable operators must often pay substantial franchise fees.[39] In addition, cable system operators must devote capacity to so-called PEG (public interest, educational and government) programming and to public access programs.[40] These obligations, of course, are not applicable to ILECs. Because nothing in the Act requires "symmetry" in the regulation applicable to ILECs and the cable systems, even if the Commission does not extend the *Computer II* unbundling obligation on cable-provided information services, it should retain those obligations for ILEC-provided information services.

C. The Commission's Decision to Eliminate the Requirement that ILECs Unbundle Certain Broadband Network Elements, and Allow CLECs to Lease Them at TELRIC-based Prices, is Completely Irrelevant

BellSouth next asserts that the Commission has already concluded, in the *Triennial Review Order,* that "limiting forced access to high-speed transmission facilities [will] . . . enhance the 'incentive' of ILECs to deploy those facilties."[41] The Commission's decision in the *Triennial Review Order,* however, has no application to this proceeding.

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[39] *See id.* § 542(b) (setting cap on local franchise fees of five percent of gross revenues).

[40] *See id*. §§ 531, 535.

[41] BS Petition at 25 (quoting *Review of Section 251 Unbundling Obligations of Local Exchange Carriers,* Report and Order on Remand, 18 FCC Rcd 16978, 17150 (2003) ("*Triennial Review Order*")).

There are fundamental differences between the type of unbundling at issue in the *Triennial Review Order,* and the type of unbundling at issue in this proceeding. In the *Triennial Review Order,* the Commission modified the rules that govern the CLECs' right to lease unbundled elements of the ILECs' networks at prices based on *forward-looking incremental costs.* The Commission did so, in part, to create incentives for both ILECs and CLECs to deploy broadband facilities.[42]

In the present proceeding, by contrast, BellSouth is asking the Commission to eliminate the ILECs' obligation to allow ISPs to purchase unbundled telecommunication services at *just, reasonable, and non-discriminatory prices*. Because ILECs require these services to provide their own information service offerings, and because the rates that the ILECs charge for services provided to ISPs can recover the ILECs' historic costs (as well as a reasonable profit), requiring the ILECs to provide these services to non-affiliated ISPs is not likely to reduce significantly the ILECs' deployment incentives. At the same time, because ISPs have never been expected to deploy their own facilities, the Commission has no need to create any incentives for them to do so.

D. Because the ILECs Compete Against Non-Affiliated ISPs in the "Downstream" Broadband Internet Access Market, the ILECs Have Clear Incentives to Discriminate in the Provision of Broadband Telecommunications Services

Finally, BellSouth asserts that continued application of the *Computer II* unbundling requirement to ILEC-provided broadband services is not necessary because the "ILECs have

[42] *See Triennial Review Order,* 18 FCC Rcd at 17150-51.

every incentive to make market-based deals with independent ISPs in order to ensure maximum utilization of the capacity of the ILECs' broadband facilities."[43] This is clearly incorrect.

The ILECs currently participate in the "down-stream" market for broadband Internet access services. Because the ILECs' wholesale broadband telecommunications services are a significant input for broadband Internet access services, and because the ILECs compete directly against non-affiliated ISPs in the market for broadband Internet access services, the ILECs have every incentive to refuse to provide wholesale broadband telecommunications services to non-affiliated ISPs – or to provide these services on unreasonable and discriminatory prices, terms, and conditions. By subjecting rival ISPs to a "price squeeze," ILECs could drive non-affiliated ISPs out of the market. The increased revenues from sales of broadband Internet access service to retail customers would more than offset the revenue loss from reduced sales of wholesale telecommunications services to the non-affiliated ISPs.

The Commission has indisputable evidence that the ILECs will discriminate in the provision of wholesale telecommunications services to firms that compete against them in "downstream" markets. Just this month, the Commission concluded that BellSouth had engaged in unlawful discrimination in the provision of special access service – an essential input for long distance service provided to enterprise customers – by offering greater discounts to BellSouth's long distance affiliate than to BellSouth's non-affiliated long distance competitors.[44] If BellSouth is willing to discriminate against wholesale customers that compete against it in the long-distance market, there is every reason to believe that BellSouth also is willing to

[43] BS Petition at 32.

[44] *See AT&T Corp. v. BellSouth Telecommunications, Inc.,* Memorandum Opinion and Order, FCC 04-278, EB-04-MD-010 (Dec. 9, 2004).

discriminate against wholesale customers that compete against it in the information services market.

III. THE ADOPTION OF PRICE CAP REGULATION HAS NOT ELIMINATED THE ILECs' INCENTIVE TO CROSS-SUBSIDIZE THEIR BROADBAND INFORMATION SERVICE OFFERINGS

Finally, BellSouth claims that the Commission must forbear from applying its Part 64 cost accounting rules to "facilities used to provide broadband information services."[45] The Commission should decline to do so.

The Commission's Joint Cost Rules require the ILECs to appropriately allocate the cost of facilities used to provide both regulated and non-regulated services. As the Commission has explained, the rules seek to ensure that "if there are savings to be gained from the integration of regulated and non-regulated ventures, those savings [are] shared equitably with ratepayers in order to achieve regulated service rates that are just and reasonable."[46] If the Commission grants BellSouth's request, however, the ILECs could force their basic telecommunications customers to absorb 100 percent of the cost of any facility that is used to provide both basic telecommunications and broadband information services. For example, if an ILEC uses its copper loop plant to provide both basic telephony and a DSL-based Internet access services, the ILEC could allow its Internet access customers to use the loop for free – thereby imposing all of the cost of the loop plant on its basic telephony customers. This plainly would have an adverse effect on the ILECs' telecommunications service customers.

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[45] BS Petition at 24.

[46] *Separation of Costs of Regulated Telephone Service from Non-regulated Activities,* Report and Order, 2 FCC Rcd 1298, 1304 (1987).

BellSouth makes the astounding assertion that the Commission's Joint Cost Rules, which were adopted in 1987, are no longer necessary because the Commission subsequently replaced rate-of-return ratemaking with the current price cap regime. "The price cap system," according to BellSouth, "was intentionally designed to prevent cross-subsidy between services, and thus, obviates the need for Part 64 cost allocation."[47] This claim is not worthy of serious consideration.

The Commission adopted the price cap regime in 1990, just three years after it adopted the *Joint Cost Order*. The Commission recognized that the price cap rules would eliminate the incentive for the ILECs to over-allocate joint costs to their regulated services in order to increase the "rate base" and, ultimately, the regulated prices they could charge to their ratepayers. The Commission, however, did not conclude that the adoption of price caps completely eliminates the ILECs' incentive to improperly allocate costs. To the contrary, the Commission recognized that, even under a price cap regime, the ILECs would retain an incentive to improperly allocate joint costs in order to cross-subsidize their more competitive non-regulated offerings, such as information services. Therefore, as part of its price cap regime, the Commission adopted a number of safeguards, designed to "police any LEC attempts to engage in predation or cross-subsidization."[48] Because the ILECs retain the ability and incentive to over-allocate joint costs to their regulated telecommunications operations in order to cross-subsidize their broadband information services, the Commission should retain the existing Joint Cost Rules.

CONCLUSION

BellSouth has failed to demonstrate that continued application of Title II common carrier regulation, the *Computer II* unbundling rules, and the Part 64 cost allocation rules to broadband

[47] BS Petition at 24.

[48] *Policy and Rules Concern Rates for Dominant Carriers,* Second Report and Order, 5 FCC Rcd 6786, 6791 (1990).

services are no longer necessary to prevent unreasonable discrimination and protect consumers. To the contrary, because the ILECs are not subject to effective competition in the wholesale broadband telecommunications services markets, and retain the incentive to discriminate against non-affiliated ISPs, these regulations remain essential. The Commission, therefore, should deny in full BellSouth's forbearance petition.

Respectfully submitted,

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